IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO. 73-573

DENIS M. VACHON,
Appellant,

vs.

THE STATE OF NEW HAMPSHIRE
Appellee.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF NEW HAMPSHIRE

PETITION FOR REHEARING

The State of New Hampshire
Office of Attorney General
State House Annex
Concord, New Hampshire 03301

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Attorney General

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The Appellee respectfully petitions the Court for rehearing or hearing in the first instance.

STATEMENT OF THE CASE

The Appellant was convicted of a violation of New Hampshire R.S.A., Chapter

169, Section 32, in that he willfully contributed to the delinquency of a minor by selling or causing to be sold to a fourteen year old girl a button with obscene material printed thereon, namely, the slogan "Copulation Not Masturbation", knowing her to be a minor. On appeal the New Hampshire Supreme Court affirmed this conviction. The Appellant thereafter appealed to this Court, jurisdiction being conferred by 28 U.S.C. § 1257(2).

In this Court the Appellant filed his Jurisdictional Statement, dated August 20, 1973. The Appellee filed its Motion To Dismiss Or Affirm, dated October 30, 1973. In a per curiam decision, dated January 14, 1974, this Court reversed and remanded, Mr. Justice Rehnquist, with whom the Chief Justice and Mr. Justice White

joined, dissenting.

STATEMENT OF GROUNDS FOR PETITION

The Appellant presented two issues to this Court for review, namely, the matter of obscenity of the material in the light of First Amendment free speech protection, and the matter of vagueness of the statute. No issue was presented to this Court concerning the adequacy of the evidence in the trial court that the Appellant had the requisite direct or imputed criminal intent. Nevertheless, without noting jurisdiction, this Court pursuant to Supreme Court Rule 40 (1)(d)(2) reversed and remanded, basing its decision upon a resolution of this unpresented issue. Although within the discretion of this Court, such procedure effectively denies to a party litigant, in this case the Appellee, the fair and

fundamental right to brief and argue its position. Summary reversal on the basis only of the Appellant's Jurisdictional Statement properly therefore should be reserved for only the clearest of "plain error not presented" and then only after probable jurisdiction has been noted or certiorari granted and the case briefed and argued. There is no "plain error" in the instant case.

The Appellee respectfully states that the majority decision of this Court misconstrues the language of the New Hampshire Supreme Court in that Court's construction of a state statute. The statute provides in pertinent part that no one shall "knowingly or willfully encourage, aid, cause or abet or connive at, or . . . knowingly or willfully (do) any act to produce,

promote or contribute to the delinquency of such child . . ." It clearly is not an element of the offense that the Appellant must personally have sold the obscene material to the minor. And to require proof of such an additional element is, as noted in the dissenting opinion of this Court (Opinion, p. 10), to rewrite the New Hampshire statute.

The New Hampshire Supreme Court, based on the trial transcript, properly ruled that the evidence was sufficient to sustain the state's burden that the Appellant knowingly contributed to the delinquency of the minor. No where in the New Hampshire Supreme Court's construction of the statute does that Court find that the Appellant must personally have sold the material. The statutory element of "knowingly or will-

fully" is satisfied beyond a reasonable doubt by the evidence of the case. The State of New Hampshire, Appellee, has no alternative but to read the majority opinion of this Court as imposing, in the absence of an appropriate federal constitutional challenge and without benefit to the Appellee of brief or oral argument, an additional element of proof upon the prosecution--an element neither required by the definition of the offense nor by the authoritative construction of the statute by this state's highest court. The Appellee respectfully submits that the Court has erred.

Wherefore, the Appellee respectfully requests that this petition for rehearing be granted, jurisdiction noted and the case set for briefs and oral argument.

Respectfully submitted,

Warren B. Rudman
Attorney General

Robert V. Johnson, II
Assistant Attorney General

By: _____

Office of Attorney General
State House Annex
Concord, New Hampshire 03301

Attorneys for Appellee

February 5, 1974

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

_____
Robert V. Johnson, II
Assistant Attorney General

I hereby certify that all copies required to be served with the foregoing petition for rehearing have been served by forwarding by United States mail, first class postage prepaid, a copy of the foregoing petition for rehearing to each counsel of record at his post office address, in accordance with [illegible].

Robert L. Johnson, II
Assistant Attorney General